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 U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

SEP 02 2011
 FILED 09/02/11 11
 DOCKETED DATE INITIAL

No. 11-

11-72595

in re David Stebbins
pro se Petitioner

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)
)

On petition for
 writ of mandamus

PETITION FOR WRIT OF MANDAMUS

Comes now, *pro se* Petitioner David Stebbins, who respectfully submits the following petition for writ of mandamus against Richard Weiking, in his official capacity as Clerk of the United States District Court for the Norther District of California ("Respondent").

1. Pursuant to FRAP Rule 21(a)(2)(B)(i), I respectfully seek a writ of mandamus ordering Respondent to grant my motion for default in the case of Stebbins v. Google, Inc.
2. Pursuant to FRAP Rule 21(a)(2)(B)(ii), I respectfully state that the issue presented in this petition is that Respondent has been called upon to perform a plain and specific duty, which required by law, and has failed to do so.
3. Pursuant to FRAP Rule 21(a)(2)(B)(iii), I respectfully submit the following statement of facts necessary to understand the issue presented by this petition.
 - (a) On August 8, 2011, I mailed to the United States District Court for the Northern District of California ("District Court") a motion to confirm arbitration award against Defendants Google, Inc.
 - (b) The motion was received by the District Court on August 15, 2011 and was assigned the case number of 11-3876.
 - (c) I served the Defendants via mailing a true and correct copy of my motion to confirm

arbitration award to the Defendants, using first class mail. Such service is sufficient when the arbitration award was in the adverse parties' home state. See 9 U.S.C. § 9, where the law states in pertinent part, "If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court."

(d) Because I mailed the motion to both the Court and Defendants on August 8, 2011, the Defendants were given until August 22, 2011 to respond. See Fed. R. Civ. P. Rule 5(b)(2)(C), "A paper is served under this rule by... mailing it to the person's last known address — in which event service is complete upon mailing." Underlined for emphasis.

(e) The Defendants did not respond to the motion to confirm the arbitration award within the allotted time.

(f) On August 23, 2011, I mailed the District Court an *ex parte* motion for default, pursuant to Fed. R. Civ. P. Rule 55(a). The District Court received this motion on August 26, 2011.

(g) On August 29, 2011, Respondent declined to enter default as to Defendants Google, Inc. No explanation was even attempted at why default was being declined.

4. Pursuant to FRAP Rule 21(a)(2)(b)(iv), I respectfully submit the following motion for why the petition should be granted.

(a) Under Rule 55(a) of the Federal Rules of Civil Procedure, a clerk must list a party in default if it has failed to plead or otherwise defend.

(b) Listing a defendant in default for failing to plead is a plain and specific duty, which is

required by law.

(c) Rule 55(a) of the Federal Rules of Civil Procedure state in pertinent part that, if the prerequisite conditions are met, “the clerk must enter the party's default.” The word “must” in this rule clearly implies a lack of discretion.

(d) In the instant case, the Defendants were sufficiently served with the motion to confirm arbitration award, and they did not respond in opposition to the motion within the allotted time. I clearly stated this in my motion for default. Therefore, I have a clear and unequivocal right to default on the part of the Defendants.

(e) Petition for writ of mandamus should not be granted if there are adequate alternative remedies available, such as appeal. See *Kerr v. United States District Court*, 426 U.S. 394 (1976).

(f) In this case, no adequate relief can be obtained by other means. I cannot file an appeal because the order is not a final judgment. Furthermore, to wait out the entire litigation, and go through the expense of proving my case, just to obtain a final judgment which I can appeal would defeat the core purpose of obtaining default.

Wherefore, premises considered, I respectfully pray you issue a writ of mandamus ordering the Respondent to grant my motion for default.

It is so respectfully submitted on this 29th day of August, 2011.



David Stebbins
1407 N Spring Rd,
APT #5
Harrison, AR 72601
870-204-6024
stebbinsd@yahoo.com

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11-72595

CERTIFICATE OF SERVICE

I, *pro se* Petitioner David Stebbins, hereby certify under penalty of perjury that a true and correct copy of the Petition for Writ of Mandamus was served on the Respondent and Court by mailing a copy thereof to the below name and address on the 30th day of August, 2011.

United States Courthouse
ATTN: Richard Weiking & Paul Grewal
280 South 1st Street
4th Floor, Room 4093 & 4095
San Jose, CA 95113



David Stebbins
1407 N Spring Rd,
APT #5
Harrison, AR 72601
870-204-6024
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Motion and Affidavit for Permission to Appeal In Forma Pauperis

in re David Stebbins

Appeal No. 11-72595
District Court or Agency No. 11-3876

v.

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed

*David Stebbins***Instructions**

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date:

*Aug. 29, 2011***My issues on appeal are:**

Respondent Richard Weiking should be instructed to grant the motion for default.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Self-employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Income from real property (such as rental income)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Interest and dividends	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Gifts	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Alimony	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____

Child support	\$ 0	\$	\$ 0	\$
Retirement (such as social security, pensions, annuities, insurance)	\$ 0	\$	\$ 0	\$
Disability (such as social security, insurance payments)	\$ 6/4	\$	\$ 0	\$
Unemployment payments	\$ 0	\$	\$ 0	\$
Public-assistance (such as welfare)	\$ 0	\$	\$ 0	\$
Other (specify): <u>see p.5</u>	\$ 25	\$	\$ 0	\$
Total monthly income:	\$ 699	\$	\$ 674	\$

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
Reliable Heat & Air, LL	584 Animal Safari Rd, Bra	05/2009 to 06/2009	\$880
Wendy's	917 HWY 65 N, Harrison, LA	06/2008 to 07/2008	\$550
Mullin's Library	365 N. McIlory Ave., Fayette	07/2007 to 12/2007	\$375

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? \$ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
First Federal Bank	checking	\$ 144.34	\$
_____	_____	\$	\$
_____	_____	\$	\$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

No noteworthy assets, except maybe my computer, which is worth about \$200.

Home	(Value)	Other real estate	(Value)	Motor vehicle #1	(Value)
_____		_____		Make & year: _____	
_____		0		Model: _____	
_____		_____		Registration #: _____	
Motor vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year: _____		computer (\$200)		_____	
Model: _____		_____		_____	
Registration #: _____		_____		_____	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
No creditors	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
No dependents	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 200	\$ _____
Are real-estate taxes included? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ 30	\$ _____
Home maintenance (repairs and upkeep)	\$ 0	\$ _____
Food	\$ 200	\$ _____
Clothing	\$ 20	\$ _____

Laundry and dry-cleaning	\$ 20	\$
Medical and dental expenses	\$ 0	\$
Transportation (not including motor vehicle payments)	\$ 0	\$
Recreation, entertainment, newspapers, magazines, etc.	\$ 30	\$
Insurance (not deducted from wages or included in Mortgage payments)	\$	\$
Homeowner's or renter's	\$	\$
Life	\$	\$
Health	\$	\$
Motor Vehicle	\$	\$
Other: Internet insurance	\$ 5	\$
Taxes (not deducted from wages or included in Mortgage payments) (specify): sales taxes	\$ 50	\$
Installment payments		
Motor Vehicle	\$	\$
Credit card (name):	\$	\$
Department Store (name): Wal-Mart	\$ 50	\$
Other: student loan	\$ 30	\$
Alimony, maintenance, and support paid to others	\$ 0	\$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ 0	\$
Other (specify):	\$ 0	\$
Total monthly expenses:	\$ 635	\$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No

If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? \$ _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? \$ _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

When I reported \$25 in "other" income, that was actually a settled lawsuit in the amount of \$300, during the month of February 2011. You wanted the average over the past year, so I divided that amount by twelve, even though I received it in one lump sum (explaining why i did not include it in my income for next month).

13. State the address of your legal residence.

1407 N Spring Rd, APT #5

Harrison, AR 72601

Your daytime phone number: (870) 204-6024

Your age: 22 Your years of schooling: 15

Your social-security number: ***-**-4148